

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

SEP 7 2 56 PM '94

DISPATCHED BY
MM Docket No. 92-157
In the Matter of

Amendment of Section 73.202(b) RM-7462
Table of Allotments, RM-8184
FM Broadcast Stations.
(Cleveland, Belzoni and Durant, Mississippi)¹

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 24, 1994; Released: September 7, 1994

By the Chief, Policy and Rules Division:

1. At the request of Larry G. Fuss, d/b/a Contemporary Communications ("petitioner"), licensee of WDTL-FM (formerly WQAZ(FM)), Cleveland, Mississippi, and successor-in-interest to Robert G. Johnston, Trustee, the Commission has before it a *Notice of Proposed Rule Making*, 7 FCC Rcd 4840 (1992), proposing the substitution of Channel 225C2 for Channel 224A at Cleveland and the modification of Station WDTL-FM's license to specify operation on the higher class channel.² To accommodate the upgrade, petitioner also proposed the substitution of Channel 292A for Channel 225A at Belzoni, Mississippi, and the modification of Station WJSJ(FM)'s construction permit accordingly (RM-7462).³ Delta filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. Comments and a counterproposal were filed by Radio Cleveland, Inc. ("RCI"), proposing the allotment of Channel 292A at Durant, Mississippi, as its first local aural transmission service (RM-8184).⁴ Delta filed reply comments.

¹ The community of Durant, Mississippi, has been added to the caption.

² As indicated in the *Notice* the instant petition was initially rejected as defective based upon a grant of Larry R. Scott's application for construction permit on Channel 225A at Belzoni, Mississippi. See *Letter* to Larry G. Fuss from Assistant Chief, Policy and Rules Division, October 18, 1990. Petitioner filed a petition for reconsideration of that action. We will treat petitioner's petition for reconsideration as a petition for rule making.

An application (File No. BAPL-920212HM) for assignment of the license of Station WDTL-FM from Larry G. Fuss, d/b/a Contemporary Communications to Delta Radio, Inc. ("Delta"), was granted on March 5, 1992. This assignment of license for Station WDTL-FM to Delta was consummated on March 15, 1992. Mr. Fuss is President and majority stockholder in Delta.

³ As indicated in the *Notice*, in recognition of the Commission's policy concerning the involuntary relocation of an authorized transmitter, petitioner provided a copy of an agreement with

2. In its counterproposal, RCI states that Channel 292A can be allotted to Durant, Mississippi (population 2,838),⁵ in compliance with the Commission's technical requirements and would place a predicted 70 dBu over the entire community. RCI argues that, according to the FM allotment priorities, a first local aural service is preferred to the upgrade of Station WDTL-FM at Cleveland, Mississippi, citing *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982) and *Andalusia, Alabama*, 49 F.R. 32201, August 13, 1984.⁶ RCI affirms that it will apply for Channel 292A at Durant, if allotted.

3. In its reply comments, Delta disputes RCI's assertion that the proposed allotment at Durant would constitute a first local aural service. Delta claims that "there is no such provision in the Commission's allotment procedures," citing *Revision of FM Assignment Policies and Procedures, supra*.⁷ Thus, Delta asserts that the allotment at Durant should be properly weighed under priority three, first local service. Delta argues that its proposed upgrade, weighed under priority four, would still be outweighed by RCI's counterproposal. However, Delta argues that the counterproposal is a "carefully crafted ruse" designed to thwart Station WDTL-FM's upgrade and thus constitutes a strike application. The Commission has noted, asserts Delta, that "a strike application is one that is filed for the purpose of impeding, obstructing or delaying the grant of a competing application," citing *Greenco, Inc.*, 28 FCC 2d 166 (1971) and *Millar v. FCC*, 707 F.2d 1530, 1535 (D.C. Cir. 1983). Delta states that in *Greenco*, the Commission articulated four factors to be used to evaluate evidence of motive to file a strike application: time, economic and competitive benefits, applicant's good faith, and the availability of other frequencies. Delta submits that RCI's counterproposal reflects all four factors, and urges that the Commission investigate the timing and circumstances surrounding the filing of RCI's counterproposal to determine whether RCI has abused the Commission's processes.

4. Moreover, Delta recognizes that the Commission has generally preferred an allotment providing a new local service when compared with an upgrade. However, the Commission should, argues Delta, now consider the adverse effect this preference has had on the radio industry. The Commission should also recognize, declares Delta, the abuse inherent within the policy established in *Andalusia, supra*, where a competitor comes forward, as RCI has done in the instant proceeding, solely to block an upgrade by

Larry R. Scott ("Scott"), permittee of Station WJSJ(FM), consenting to a change in its authorized transmitter site, as well as its proposed channel of operation, to accommodate the modification for Station WDTL-FM.

⁴ Public Notice of RCI's counterproposal was given on February 17, 1993, Report No. 1927.

⁵ Population figure taken from the 1990 U.S. Census.

⁶ The FM allotment priorities are: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. [Co-equal weight given on priorities (2) and (3)].

⁷ Delta notes that the Commission in *Apalachicola and Carrabelle, Florida*, 6 FCC Rcd 7147 (1991), clarified that the "first allotment priority is provision of a first full-time aural service. This refers to *reception* service, not to *transmission* service. Allotment priority three, first local service, refers to provision of a community's first *transmission* service."

proposing a first local service at another community. Delta encourages the Commission to revise the policy established in *Andalusia* to acknowledge that expanded service by existing stations should not always be precluded by conflicting requests for a first local service to another community.

5. Delta asserts that although there are no alternate Class C2 channels available at Cleveland and no alternative Class A channels available at Belzoni, there are other Class A channels available at Durant. Delta claims that there are at least three alternate Class A channels (Channels 266A, 268A and 270A) that are available at Durant. Moreover, Delta states that the construction permit (File No. BPH-870327KD) for Station WJSJ(FM) for Channel 225A at Belzoni expired on August 25, 1992.⁸ Therefore, Delta notes that Channel 225A could be removed from Belzoni without replacement, and that Channel 292A can be allotted to Durant in order to resolve the conflict.

6. Based on the information before us, we believe that each of the petitioners has shown that the public interest would be served by a grant of its respective request. Further, we find that each of the allotment requests can be accommodated and thus comparative consideration of the competing proposals is unnecessary. Thus, we need not address Delta's argument that the Commission should revise the allotment priorities. With respect to Delta's unsubstantiated claim that RCI filed its proposal to thwart Delta's proposed upgrade, at this stage of the proceeding the evidence is insufficient to show that the petition was filed as a strike petition. Thus, we believe that it would be in the public interest to allot an FM channel at Durant as its first local aural transmission service.

7. An engineering analysis has determined that Channel 266A can be allotted to Durant, Mississippi, in lieu of Channel 292A, thereby permitting the allotment of a Class C2 channel at Cleveland, Mississippi, and the allotment of a Class A channel at Durant. Therefore, we will substitute Channel 225C2 for Channel 224A at Cleveland, since this action would provide the community with a wide coverage area FM transmission service. In order to accommodate the upgrade at Cleveland, we will also substitute Channel 292A for the now vacant Channel 225A at Belzoni. In addition, we will allot Channel 266A at Durant as the community's first local aural transmission service. Channel 225C2 can be substituted at Cleveland in compliance with the Commission's minimum distance separation requirements at the petitioner's licensed site.⁹ Channel 292A can be substituted

at Belzoni in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.4 kilometers (5.2 miles) southeast.¹⁰ We will order that a filing window be opened for Channel 292A at Belzoni.¹¹ Channel 266A can be allotted to Durant in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.0 kilometers (0.6 miles) north.¹² As requested, we also modify Station WDTL-FM's license to specify operation on Channel 225C2 at Cleveland.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 21, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

| City | Channel No. |
|------------------------|------------------------|
| Cleveland, Mississippi | 225C2, 252C3, 280C3 |
| Belzoni, Mississippi | 292A, 296A |
| Durant, Mississippi | 266A |

9. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Delta, Radio, Inc., for Station WDTL-FM, Cleveland, Mississippi, IS MODIFIED to specify operation on Channel 225C2, in lieu of Channel 224A, subject to the following conditions:

- (a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

⁸ Delta notes that Scott has elected not to proceed with the construction of a Class A facility at Belzoni, Mississippi, and has requested the cancellation of Station WJSJ(FM)'s construction permit. Scott also advised the Commission that he had no objection to the deletion of Channel 225A at Belzoni. Scott's request for the cancellation of Station WJSJ(FM)'s construction permit was granted on May 6, 1993.

⁹ The coordinates for Channel 225C2 at Cleveland are North Latitude 33-45-12 and West Longitude 90-42-45.

¹⁰ The coordinates for Channel 292A at Belzoni are North Latitude 33-08-06 and West Longitude 90-24-58.

We note that the coordinates for Channel 292A at Belzoni are short-spaced to Station WLTD(FM), Channel 292A, Lexington, Mississippi. However, the license for Station WLTD(FM) was modified to specify operation on Channel 290C2 at Pickens, Mississippi, in the context of MM Docket No. 91-183. See 6 FCC Rcd 5559 (1991). Our records reveal that Station WLTD(FM)'s construction permit (File No. BPH-920228IM) for Channel

290C2 at Pickens was modified on September 21, 1993. Therefore, the issuance of a license for a station on vacant Channel 292A at Belzoni, may be withheld until Station WLTD(FM) is licensed on Channel 290C2 at Pickens. We will serve the licensee of Station WLTD(FM) with a copy of this *Report and Order*.

¹¹ We note that Channel 225A was allotted to Belzoni in MM Docket No. 84-231. See 50 FR 3514, January 25, 1985. Scott, holder of the construction permit for Channel 225A, filed a letter with the Commission on October 5, 1992, stating that he did not intend to build a facility at Belzoni. His construction permit for Channel 225A was thereafter cancelled. See *supra* n.8. Therefore, a new filing window will be opened by this *Order*.

¹² The coordinates for Channel 266A at Durant are North Latitude 33-05-00 and West Longitude 89-51-00.

10. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, **if the request is granted**, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Delta Radio, Inc., licensee of Station WDTL-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

11. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following:

J. Scott Communications, Inc.
4519 Radnor Road
Indianapolis, Indiana 46226
(Licensee of Station WLTD(FM))

12. The window period for filing applications for Channel 292A at Belzoni, Mississippi, and for Channel 266A at Durant, Mississippi, will open on **October 24, 1994**, and close on **November 21, 1994**.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau